No. 9454

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM I. HEFFRON, as Trustee of the Estate of Fred Williams, Bankrupt,
Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION and LAWRENCE WAREHOUSE COMPANY,
Appellees.

BRIEF FOR APPELLEE, LAWRENCE WAREHOUSE COMPANY.

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION.

The Lawrence Warehouse Company was not a party to the proceedings before the Referee in Bankruptcy.

After the decision of the Referee, and on May 29, 1939, a stipulation was entered into by the Appellant Trustee and the Appellee Bank of America, National Trust & Savings Association that the Lawrence Warehouse Company might appear as amicus curiae and it was so ordered by the District Court on the 1st day of June, 1939. (Transcript of Record, Vol. I, pp. 153-154.) The Lawrence Ware-

house Company did appear as amicus curiae and filed its brief in the proceeding before the District Court.

On December 13, 1939, the District Court issued its Citation on Appeal addressed to the Appellee Bank of America, National Trust & Savings Association and to the Lawrence Warehouse Company, as Appellee, a copy of which said Citation on Appeal was served upon counsel for said Lawrence Warehouse Company on December 18, 1939 (Transcript of Record pp. 2 and 3), and on March 1, 1940 the Lawrence Warehouse Company filed its appearance as an appellee with the clerk of this Court.

The Lawrence Warehouse Company not having been a party to the action before the Referee in Bankruptcy or before the District Court therefore adopts the Statement of Pleadings and Facts Disclosing Basis of Jurisdiction set forth in the brief filed on behalf of Appellee Bank of America, National Trust & Savings Association to which brief reference is most respectfully made.

STATEMENT OF THE CASE.

The question raised in this appeal is whether transactions initiated and carried out under the provisions of the Uniform Warehouse Receipts Act (Statutes 1909, Chapter 290 as amended) were subject to the provisions of Section 3440 of the Civil Code (Appendix p. ii) prior to the amendment of that section by the addition of Section 3440.5 to the Civil Code. (Appendix p. iv.)

As the brief of the Appellee Lawrence Warehouse Company is in effect supplementary to that filed on behalf of Appellee Bank of America, National Trust & Savings Association, the Court is respectfully referred to that brief for, and this appellee adopts, the statement of the case contained in the brief filed on behalf of the Bank of America.

ARGUMENT.

This brief is designed to supplement the brief filed on behalf of Appellee Bank of America upon two of the questions presented, namely: (1) There was an actual, immediate and continued change of possession of the steel represented by warehouse receipts (Point III of Argument, p. 27 et seq., Brief of Appellant); (2) the storing of commodities and the pledge of the warehouse receipts was not in violation of Section 3440 of the Civil Code. (Point I of Argument, Brief of Appellant, p. 17 et seq.)

POINT I.

THERE WAS AN ACTUAL, IMMEDIATE AND CONTINUED CHANGE OF POSSESSION OF THE STEEL REPRESENTED BY THE WAREHOUSE RECEIPTS.

The Referee in deciding that there was not an actual and continued change of possession writes in his decision:

> "While the evidence in this case presents a close question as to whether or not there was an actual and continued change of possession, there

> are strong indications of a subterfuge when considering the nominal amount of rent paid, the manner in which Rinne was employed, and the free access which was allowed the bankrupt in and around the premises, and the failure of the warehouse company to make and keep a proper inventory and to permit a commingling of certain of the pledged goods with free goods.
>
> "I am not satisfied from the evidence that the actual and continued change of possession contemplated by Section 3440 of the Civil Code and as defined and construed by the court in the McCaffey case has taken place." (Trans. 83.)

From this statement of facts, the referee concluded that there was no immediate delivery of any steel to the warehouse company. (Trans. 101.)

Cases are legion that on a hearing of a contested claim the formal proof thereof must be accepted as a prima facie establishment of the claim presented thereby, and casting upon the contestant the burden of proving the specifications of objection. Title 11, U. S. Code Ann. Section 93 (f), page 262.

The burden was on the trustee to prove that there was not an actual and continued change of possession. The most the Referee says is that the evidence is "close" and he is "not satisfied".

The District Judge in his opinion was satisfied that there was an actual and continued change of possession, saying:

> "The transactions between the bankrupt and the Lawrence Warehouse Company substantially fulfilled every requirement of a legitimate ware-

housing transaction under the Act referred to." (Warehouse Receipts Act.) (Trans. 155.)

The finding of the Court, reversing the referee is

> "The Lawrence Warehouse Company at all times since the various deliveries of steel to it by the bankrupt maintained a real, actual, and bona fide possession of all the steel in full compliance of the provisions of the Warehouse Receipts Act of the State of California." (Trans. 160.)

The evidence is not susceptible of the finding of the referee.

The strong indications of a subterfuge to which he refers are (a) the nominal amount of rent paid; (b) the manner in which Rinne was employed; (c) the free access which was allowed the bankrupt in and around the premises; (d) the failure to keep an inventory and permitting a commingling of pledged and free goods.

Let us look at these matters in order.

(a) The nominal amount of rent paid.

In considering this question it is necessary to understand field warehousing; its function in the business world; the advantages to a storer-borrower and a lending bank; and the obligations of a warehouse company.

We may concede that field warehousing is not designed for the mere storage and care of commodities but is a method of creating commodity paper against inventory, or, in other words, the warehousing

of goods in storage space at the establishment of the owner by means of which a warehouse receipt is obtained which may be pledged as collateral security for a loan based upon the value of the merchandise. The advantage to the borrower is his ability to use his inventory just as for many years other borrowers have used stocks and bonds. That is a perfectly legitimate transaction and Lawrence System is the instrumentality by which such financing may be accomplished.

The transaction is fully approved by the Supreme Court of the United States in *Union Trust Company v. Wilson,* 198 U. S. 530, 49 L. Ed. 1154, 25 Sup. Ct. 766 (1905), in which the bankrupt, a wholesale leather dealer, walled off a part of his basement space, leasing it at a nominal rent to the Security Warehousing Company. The warehouse company placed its padlock upon the door and retained the only key. There was no one else who could get access without breaking in. There were two signs on the outside, stating in large letters that the premises were occupied by the company as a public warehouse.

As leather was received into the storage space from the bankrupt, the company issued a warehouse receipt reciting that it had received the leather on storage, subject to the order of Flanders and Company, and to be retained in storage and delivered only upon surrender of the receipt properly endorsed and payment of all charges. Each parcel of leather was tagged with a card stating that it was in possession of the warehouse company. The Bankrupt paid to the company a storage fee of $20.00 per month for

the first $10,000.00 worth of property, and $1.00 per month for each additional $1000.00, together with the expenses of the company in connection with storing the goods. The warehouse receipts were endorsed by the Bankrupt to the *Union Trust Company* as security for loans made to him. When the bankrupt desired to remove any part of the leather, he paid the necessary sum to the trust company, was entrusted with a receipt, got the warehouse company to send a man to unlock the place of enclosure, and allow the removal, and the amount delivered was then endorsed upon the receipt.

The Trustee in Bankruptcy filed his bill in the District Court alleging the storage arrangement to have been fraudulent and claiming the leather on the ground that it always had been in the possession of the Bankrupt.

The Court says:

> "There can be no doubt on the facts as stated, without more, that the company had possession of the goods. It had them under lock and key in a place to which it had a legal title and right of access by lease * * *. When there is conscious control, the intent to exclude and the exclusion of others, with access to the place of custody as of right, there are all the elements of possession in the fullest sense * * *. It is true that the evident motive of Flanders was to get his goods represented by a document for convenience of pledging rather than to get them stored, and the method and amount of compensation show it. But that was a lawful motive and did not invalidate his acts if otherwise sufficient.

> He could get the goods by producing the receipts and paying charges, of course, but there is no hint that the company did not insist upon its control." (49 L. Ed., p. 1156.)

Omitting, for the sake of brevity, the many intervening cases, let us refer to the last two known decisions.

In *In re Wyoming Valley Colleries Company,* 29 Fed. Supp. 106 (D. C., M. D. Pa. 1939), the question arose on the petition of a wage claimant who contended the field warehousing plan was invalid. The Court says:

> "The warehousing plan involved in this case was as follows: A large tract of land adjacent to the breaker of the bankrupt was leased to the Consolidated Real Estate Company. * * * Around this land were posted a number of signs reading: 'No Trespassing—Consolidated Real Estate Company'. On this land the bankrupt, from time to time, placed coal by means of a chute leading directly from the breaker to the land. After a certain amount was added, to the pile of coal upon this storage field, the Consolidated Real Estate Company would issue a warehouse receipt to the Federal Reserve Bank of Philadelphia, who would then advance to the bankrupt a sum of money in accordance with a prearranged loan agreement. * * * When the bankrupt desired to use some of the stored coal, a notice was sent to the bank who would forward a receipt for the amount of coal desired to a bank in Scranton, and this receipt would be released to the bankrupt upon payment for the amount of coal represented by the receipt. The

receipt would then be forwarded to the Consolidated Real Estate Company with a request that they notify their employees to release that amount of coal to the bankrupt. * * * The coal was stored and removed by employees of the bankrupt. * * *" (p. 108.)

"From the above facts the Court has concluded that a valid warehousing plan exists. This type of warehousing differs from that of the ordinary type in that the bulky nature of the property stored requires a different manner of storage from that which is ordinarily used. The Courts have recognized that ordinary rules must be relaxed and the plan must be considered with due allowance for the practical difficulties which exist. Manufacturers Acceptance Corp. v. Hale, 6 Cir., 65 F. 2d 76. Thus, similar plans have been declared valid involving the storage of lumber, steel billets and similar items. Manufacturers Acceptance Corp. v. Hale, 6 Cir., 65 F. 2d 76; Equitable Trust Co. v. A. C. White Lumber Co., D. C., 41 F. 2d 60; First Nat. Bank of New Kensington v. Pennsylvania Trust Co., 3 Cir., 124 F. 968. * * *

"The admitted purpose of this warehouse plan was to create collateral for loans needed by the company for operating capital. This motive does not invalidate a plan otherwise lawful, but rather is a reason for holding the plan valid. Union Trust Co. v. Wilson, 198 U. S. 530, 25 S. Ct. 766, 49 L. Ed. 1154. The only requirement which the cases seem to impose is that the pledged goods should be so marked that creditors of the pledgor will not be led to believe that the goods are those of the pledgor." (p. 109.)

The last decision is by Judge Malcolm Douglas of the Superior Court of Washington at Seattle in *Carson v. Evergreen Shingle Company, et al.* (unreported). The issue in that case arose on the complaint of mill worker lien claimants who contended among other things, that there was no change of possession of the commodities stored with this appellee, basing the contention largely upon the fact that the bonded agent was a former employee of the storer. In sustaining the warehousing, Judge Douglas said:

> "First,—with respect to the warehouse agreement and the actions and conduct of the parties in connection therewith,—it seems to the Court that an effort to create a system to turn inventory commodities into commercial paper, or to make them available for raising money or commercial paper based on inventory, was a bona fide effort; that it has none of the characteristics that have been severely frowned upon in some of the cases where the facts were otherwise. In my opinion, the effort on paper certainly was complete and established exclusive possession and control. It was evidence, in fact, by the warehouse company doing everything that a warehouse company similarly situated could do to give notice to the public, creditors and potential creditors that they did have possession and control of the manufactured product,—their signs, their locks, their recorded leases and the employment and bonding of agents, show to the satisfaction of the Court that they did everything that could be done to work out such a system. * * *
>
> "* * * I am not only satisfied that it was a bona fide system, but I am satisfied that as a

> matter of public policy it is a salutary system. * * * Any system which makes it easier to finance production and to meet payrolls, should be encouraged by the Courts rather than looked upon with disfavor, because in the long run more people will benefit by such a system than by one that discourages them."

Thus we see that the Lawrence System of field warehousing is founded upon firmly established legal principles.

The Uniform Warehouse Receipts Act, adopted by the State of California by the Statutes of 1909, Chap. 290, Deering's Gen. Laws, Act 9059, imposes upon the warehouseman the obligation to deliver the goods to the holder of the warehouse receipt upon demand accompanied by an offer to satisfy the warehouseman's lien (Sec. 8) and is made liable as for conversion in case of misdelivery. (Sec. 10.) Also, a warehouseman is made liable to a holder of a receipt for damages caused by the non-existence of the goods (Sec. 20), and for any loss or injury caused by failure to exercise such care of the goods as a reasonably careful owner would exercise. (Sec. 21.)

It is thus apparent that while the lease calls for a nominal payment of one dollar per year, it is expressly "in consideration of the premises and agreements herein contained" (Trans. 225) which brings in the entire service of appellee.

Not only is there that far from nominal rent, but, also, the bankrupt was enabled to make a collateral pledge without the expense of moving his heavy prod-

uct to other space to effect an actual change of possession which is a fundamental requirement in every pledge.

As is said in *Love v. Export Storage Company,* 143 Fed. 1 (6th C. C. A., 1906):

> "And they may be warehoused upon what are the owner's premises at the time of the warehousing, and that, though they may then be on these premises and without changing their location thereon. *The only thing essential to the warehousing of goods is that their possession be changed from that of their owner to that of the warehouseman. * * * He can place them in the custody of another and station him where the goods are to assert control over them and prevent others from interfering with them. Such a way of acquiring control is as effectual as placing the goods under lock and key.* That is what the appellee storage company did here. It placed them in the custody of Lewis, and stationed him at the lumber yard to assert control and prevent others from interfering with the lumber, taking from him a $5000 bond with good surety for the faithful performance of his duties as custodian from July 13, 1901 to May 3, 1902." (page 13; italics ours.)

So, in the instant case, appellee and the bankrupt entered into a storage agreement (Trus. Ex. 7, Trans. 233) and, pursuant to its terms, the bankrupt executed and delivered an actual, not a purported, lease of the premises to Lawrence. (Trus. Ex. 7, Trans. 224.) Lawrence took actual possession and placed adequate and numerous signs on the outside and in-

side of the premises. (Res. Exs. A2, A3, A5, A6, A7, Trans. 315 et seq.) When the goods were stored, it placed stack cards thereon showing that they were warehoused to Bank of America, their description, the date, the warehouse receipt number, the item and number of units. (Res. Exs. A1, A4, A5, A7, Trans. 314 et seq.) It placed locks upon all entrances (Res. Exs. A2, A3, Trans. 315, 316, 378, 379, 450); it retained possession of all merchandise until properly released. (Trans. 328, 329, 330.) It excluded even the storer from access except through its bonded agent. (Trans. 263.)

These steps were not idle forms. They were actual transactions, and the only transactions at the warehouse. Each step, each act, is conclusively proved in the evidence introduced before the Referee and is uncontradicted. Those steps are not controverted by the Trustee. Thus, the suggestion of a nominal rent is of no force.

(b) The manner in which Rinne was employed.

Mr. Rinne, prior to the installation of Lawrence System on July 22, 1937 had been an employee of the bankrupt since April, 1936. (Trans. 371.) When appellee undertook the storage of commodities it employed Rinne as its bonded agent under a written contract (Trus. Ex. 10, Trans. 368), placed him under a bond of $100,000, and gave him detailed printed instructions as to his duties. (Res. Ex. E, Trans. 382-447.) He was paid solely by Lawrence. (Trans. 373.) There is no suggestion in the evidence or in the

brief that he was ever unfaithful to his trust. He opened and closed the warehouse, keeping it locked at all times he was not personally there (Trans. 378, 450), and received and delivered all merchandise. (Trans. 374.)

The fact that the bonded agent had been in the employ of the bankrupt did not in any degree diminish the actual bailment.

In *Love v. Export Storage Co.,* supra, the Court says:

> "It is unimportant that at the time of his appointment as custodian, he was the servant of the hardwood company and continued such after his appointment and received no other pay than the wages paid him by the hardwood company until the appointment of the Receivers in Bankruptcy. It is well settled in cases of this sort that the warehouseman may acquire and hold exclusive control and possession of goods in such a way and under such circumstances." (page 14.)

In the instant case, however, from the employment of Mr. Rinne by Lawrence under a written contract, his wages were paid solely by Lawrence and he was solely in the employ of Lawrence and subject only to its directions.

In *Philadelphia Warehouse Co. v. Winchester,* 156 Fed. 600 (C. C., D. Del., 1907), the Court says:

> "The law does not render an officer or agent of the pledgor and pledgee incompetent to be the custodian of the pledged property, where the parties agree." (page 611.)

Again, in *American Can Co. v. Erie Preserving Co.*, 171 Fed. 540 (C. C., W. D. N. Y., 1909), affirmed 183 Fed. 96 (2d C. C. A., 1910), the Court says:

> "It is not intended to hold that property as collateral security may not be stored by the pledgee at such place as he selects, or that the warehousing company cannot designate as custodian an employee of the pledgor." (page 546.)

The Trustee attempts to answer (Tr. Bf. p. 30) the clear holdings of the above cases by a quotation from *McCaffey Canning Company, Inc. v. Bank of America*, 109 Cal. App. 415, 294 P. 45 (1930), to the effect that the employment of one of the staff of the owner as warehouse custodian "while not conclusively ineffectual, is, nevertheless, an instance to give pause, and must be weighed carefully in connection with the other facts in evidence".

But the Trustee fails to point out any other facts in evidence reflecting upon the employment of Mr. Rinne, and naturally so for the reason that there are no other facts to be considered.

Thus we see that the employment of Mr. Rinne as agent was not only proper but wise, and that he maintained a perfect bailment.

(c) The free access which was allowed the bankrupt.

(d) The failure to keep an inventory and permitting a commingling of pledged and free goods.

As we have previously pointed out, the bonded agent of this appellee had sole charge of the warehouse premises, he kept them locked at all times he was not

personally present, he received all merchandise and loaded the truck with all steel leaving the warehouse. (Trans. 376.)

The entrance to the warehouse from the office occupied by the bankrupt was a double door over which was securely fastened a nine by twenty metal sign reading, "Notice All Commodities In or Upon These Premises Are in The Custody of Lawrence Whse Co., Lessee No Trespassing" and upon which was placed a Lawrence lock. (Res. Ex. A2, Trans. 315.) That door was never open unless unlocked by Rinne and then only when he was in the warehouse working on the steel in storage.

The Bankrupt, a witness for the Trustee, is specific that, until he borrowed money, he had a warehouseman but that after his contract with Lawrence, it had its bonded agent in charge of the warehouse. (Trans. 245, 246.) Further, that as orders came in they were delivered to the bonded agent of appellee who sorted out the materials and delivered them to the Bankrupt's truck driver. (Trans. 246, 247.) Speaking particularly of access, the Bankrupt testified, "We occupied the offices in front and the Lawrence Warehouse Company had only access to the warehouse in the back" (Trans. 251), and that he had access to the warehouse only through appellee's agent. (Trans. 263.)

It is difficult, with the record barren of any contrary testimony, to find that the Bankrupt had any access to the warehouse.

It is true that there was unpledged merchandise in the warehouse.

Mr. Rinne, appellee's agent, a witness for the Trustee, testified on direct examination:

"Mr. Seymour. Q. You are familiar with the fact that there were some what is called free goods?

A. Yes.

Q. Stuff not under a pledge or claimed pledge or lien?

A. Yes.

Q. There were certain dimensions of steel of the same size and so forth. How was that kept? All in one stack, or separately or how?

A. The sizes were all kept together, the same size in the same pile, and the free goods was designated with a little band on it, or wrapped with wire. The warehouse goods was wrapped with wire, or if they were next to free goods they were banded with a band iron so that below that would be the other.

The Referee. Was free goods and the goods on which there were receipts kept in the same piles?

A. Yes, sir.

Q. But separated by bands or wires?

A. Yes, sir." (Trans. 374, 375.)

The referee has answered his strong indication of subterfuge in permitting a commingling of pledged and free goods in his finding that "The steel consisted of steel of various standard dimensions, each unit of each dimension being of substantially the same quality". (Trans. 88.)

The only commingling was of steel of the same size. (Trans. 375.) Such a practice is specifically provided for in Section 23 of the Uniform Warehouse Receipts Act.

> "If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade."
>
> " 'Fungible goods' means goods of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit." Warehouse Receipts Act Section 58.

In *Simpson & Doeller Company v. Sears & Nichols Corporation,* 25 Fed. Supp. 200 (D. C., S. D. Ohio, E. D., 1938), the Court rejected a contention that the commingling of pledged and free goods of the same variety showed that the storage company did not have possession of the pledged goods, saying:

> "Such a deduction would place a warped construction upon the facts shown." (page 203.)

We submit, that the evidence does not sustain the suspicions of the Referee.

The Trustee, in his brief, fails to point out any testimony to sustain his contention. On the contrary, he founds his contention solely on *McCaffey Canning Company v. Bank of America,* supra, a case which arose upon the motions of defendants for nonsuit and which actually decided only that the matter should have been submitted to the jury. The opinion does, however, in carefully chosen language set forth some principles of law which are not contrary to, but follow the Federal decisions which we have cited, and we accept the principles of law in that case quoted as follows:

> "When there is actual delivery of merchandise to a warehouseman, with actual and explicit

change of possession, and a warehouse receipt is issued and delivered to one lending money on the security of the merchandise in store, the delivery of the warehouse receipt is the legal equivalent of the delivery of the merchandise itself; but such symbolic possession by the pledgee is dependent for its efficacy upon complete and actual, as distinguished from merely formal or colorable relinquishment of possession and control by the pledgor." (page 428.)

"Warehousing on the premises of the owner proposing to pledge his merchandise is effective when done in obedience to legal requirements. * * *

"The term 'field warehousing' is not a talisman to give dominion by enchantment. Taking exclusiveness of possession and control as the criterion, we find now and then a case where it may be said as a matter of law, through the field warehouse, open, exclusive and unequivocal possession passed constructively to a pledgee; and then again, in other cases, we find that as a matter of law, the possession of the warehouseman 'tapers away' to nothingness. * * *

"There must be open, visible, unequivocal change of possession, manifested by such substantial outward signs as to make it evident to the world that the control of the owner has wholly ceased, and that another has acquired, and is openly exercising the exclusive dominion over the property. * * *

"Actual change of possession means existing in act, and truly and absolutely carried out, as opposed to formal, potential, virtual or theoretical change. Bunting v. Saltz, 84 Cal. 168; Guthrie v. Carney, 19 Cal. App. 144.

"The proof required to show actual change of possession is not measured by any fixed set of rules. Dependence must be placed upon the facts and circumstances of each particular case * * *." (pages 434-5.)

"In the discussion in which we have indulged, we are not to be understood as intimating any opinion upon the question whether the circumstances in evidence do, or do not, show a change of possession satisfying the law. * * * We hold merely that the circumstances are not such that it can be said absolutely as a matter of law that there was an actual, open, visible, and unequivocal change of possession. The plaintiff was, therefore, entitled to the submission of the facts to the jury. * * *" (page 437.)

With the principles of law enunciated we thoroughly agree, just as those principles agree with the Federal decisions which we have quoted, and particularly with the case of *Union Trust Co. v. Wilson,* supra.

Let us quote from the *Wilson* case:

"When there is conscious control, the intent to exclude and the exlusion of others with access to the place of custody as of right, there are all the elements of possession in the fullest sense." (49 L. Ed. page 1156.)

Now, let us quote from the *McCaffey* case:

"Actual change of possession means existing in act and truly and absolutely carried out as opposed to formal, potential, virtual or theoretical change." (page 435.)

Let us again quote from the *Wilson* case:

> "No doubt, there are other cases in which exclusive power of the so-called bailee gradually tapers away until we reach these in which the courts have held as a matter of law that there was no adequate bailment." (49 L. Ed. page 1156.)

Let us again quote from the *McCaffey* case:

> "Taking exclusiveness of possession or control as the criterion, we find now and then a case where it may be said as a matter of law through the field warehouse, open, exclusive and unequivocal possession passed constructively to a pledgee; and then again in other cases, we find that as a matter of law, the possession of the warehouseman 'tapers away' to nothingness." (page 435.)

The rules laid down by the Supreme Court of the United States were sufficient foundation for the rules laid down by the California Appellate Court in the *McCaffey* case. We accept those rules which we have quoted, and submit that appellee complied with them in their very strictest sense in the conduct of the warehouses in question.

The Trustee feebly suggests that the Referee, as the trier of the facts, was, in effect, the jury and that his finding was conclusive.

That is not the law as held in *In re Schaefer Co.*, 103 Fed. (2d) 237 (6th C. C. A., 1939), in which the Court said:

> "No fixed rule can be laid down for determining the weight to be given a finding of fact by

a bankruptcy referee, but depends on its character. If it be a deduction from established facts as is the case here, *it is entitled to but little weight as the judge, with the same facts, may as well drew inferences or deductions as the referee* but where the referee's finding is based upon conflicting evidence involving questions of credibility and he has heard the witnesses, much greater weight attaches to his conclusions and in the latter case, his findings will not be disturbed unless there is cogent evidence of a mistake and miscarriage of justice. Ohio Valley Bank Co. v. Mack, 6 Cir., 163 F. 155, 24 L.R.A.N.S., 184; * * *'' (page 242; italics ours.)

On the contrary, the finding of the District Court reversing the Referee will not be disturbed by this Court unless there is no substantial evidence or theory to justify the District Court finding. This is held in *In re Duvall,* 103 Fed. (2d) 653 (7th C. C. A., 1939), in which the Court says:

"At one time it appears the court had very little, if any, authority in this respect in cases where the evidence before the referee was in conflict. * * *

"The question must now be determined, however, with reference to Rule 47 of General Orders in Bankruptcy, 11 U.S.C.A. following section 53, which appears to give the court greater latitude than it theretofore had. The rule, so far as is here material, provides: 'The reports of referees * * * shall be deemed presumptively correct, but shall be subject to review by the court, and the court may adopt the same, or may modify or reject the

same in whole or in part when the court in the exercise of its judgment is fully satisfied that error has been committed'. * * *

"We do not think that it can be held that the District Court is bound by the 'substantial evidence' rule with regard to the findings made by the referee. While the rule makes the referee's finding presumptively correct, yet the court is vested with authority to 'reject the same in whole or in part when the court, in the exercise of its judgment, is fully satisfied that error has been committed'. This language can not, in our judgment, be the equivalent of the 'substantial evidence' rule. Of course, the judgment exercised by the court must not be arbitrary, but where there are facts and circumstances concerning which reasonable minds might differ, we think the court, after indulging in the presumption which the rule accords the referee's report, may exercise its judgment even though it be contrary to the finding as made by the referee, and when the court's judgment has been thus exercised, we do not think we are at liberty to disturb the same except where we might conclude there was no substantial evidence or theory which would justify the court in reaching a conclusion contrary to that of the referee." (page 655.)

The Uniform Warehouse Receipts Act, the decisions of State and Federal Courts make "warehousing on the premises of the owner proposing to pledge his merchandise * * * effective when done in obedience to legal requirements". *McCaffey Canning Co., Inc. v. Bank of America,* supra.

The California Legislature made very clear the interpretation to be given to the Warehouse Receipts Act by incorporating therein section 57 which provides:

> "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it."

The general purpose of uniformity and exclusion, or repeal, of any inconsistent legislation is clearly and conclusively expressed in *Jewett v. City Transfer & Storage Co.,* 128 Cal. App. 556, 18 P. (2d) 351 (1933), as follows:

> "Considering the provisions of the statute known as the Warehouse Receipts Act, it is apparent that *its purpose was to revise the entire subject matter relating to the general business of conducting a public warehouse."* (Page 562; italics ours.)

The Supreme Court of Arizona has construed the Act in *Salt River Valley Water Users Assn. v. Peoria Ginning Co.,* 27 Arizona 145, 231 Pac. 415 (1924), in the following language:

> "To unify the commercial law of the country was the object of the Uniform Warehouse Receipts Act. The industrial and economic necessity of such unification was pressing. To fully accomplish the purposes of the Act, the courts must be mindful in their interpretation that the receipts to be issued under the Act were to pass current in the commercial world as negotiable documents of title. Local laws must be interpreted in the light

> of the desire to make the Uniform Warehouse Receipts Act universal in its application throughout the commercial world." (231 Pac. Page 416.)

See also *Mason v. Exporters and Traders Compress Co.*, 94 S. W. (2d) 758 (Texas Civ. App., 1936).

The Supreme Court of the United States has similarly construed the effect of the act in the case of *Commercial National Bank of New Orleans v. Canal-Louisiana Bank & Trust Company,* 239 U. S. 520, 60 L. Ed. 417, 36 Sup. Ct. 194 (1916), in which case Mr. Justice Hughes stated:

> "It is apparent that if these uniform acts are construed in the several states adopting them according to former local views upon analogous subjects, we shall miss the desired uniformity, and we shall erect upon the foundation of the uniform language separate legal structures as distinct as were the former varying laws. It was to prevent this result that the uniform warehouse receipts act expressly provides—(Sec. 57): 'This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.' This rule of construction requires that in order to accomplish the beneficient object to unifying, so far as this is possible under our dual system, the commercial law of the country, there should be taken into consideration the fundamental purpose of the uniform act, and that it should not be regarded merely as an offshoot of local law. The cardinal principle of the act—which has been adopted in many states—is to give effect, within the limits stated, to the mercantile view of documents of title. There had been

> statutes in some of the states dealing with such documents, but there still remained diversity of legal rights under similar commercial transactions. We think that the principle of the uniform act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it; and, in this view, we deem it to be clear that, in the circumstances disclosed, the Commercial Bank took title to the warehouse receipts and to the cotton in question." (60 L. Ed., p. 421.)

Of the last cited case, District Judge McCormick said in *In re Boswell,* 20 Fed. Supp. 748 (D. C., S. D. Calif., C. D. 1937), affirmed by this Court in 96 Fed. (2d) 239 (9th C. C. A., 1938), a case to which we have later more specifically referred:

> "The language of the United States Supreme Court in considering the 'Uniform Warehouse Receipts Act' in Commercial Nat. Bank v. Canal-Louisiana Bank & Trust Co., 239 U. S. 520, 528, is considered a chart for our course in this similar effort of the State of California to join in the march of states removing some of the objectionable conflicts in the laws that regulate credit and business throughout the country." (Page 752.)

Clearly, therefore, the purpose of the Uniform Warehouse Receipts Act was intended to be, and is uniformity in all pledges through the use of warehouse receipts.

The Lawrence System, operated at the time of trial in thirty-three states, Honolulu and Alaska (Trans. 508) furnishing safe service in eight hundred and

twenty warehouses (Trans. 510) and storing some $200,000,000.00 of merchandise, and conducted under strictest management, clothed with every known means of maintaining "open, visible, unequivocal change of possession, manifested by such outward signs as to make it evident to the world that the control of the owner has wholly ceased" has provided an economical method by which tradesmen have had available a method of obtaining secured loans from banking corporations and the banking corporations have been enabled to make safe loans. Appellee Bank of America, only one of the many financial institutions employing Lawrence services, had outstanding some $10,000,000.00 of loans secured by Lawrence System warehouse receipts. (Trans. 452.) So long as the warehouses are conducted in obedience to legal requirements, those loans are safe and the pledge is beyond the reach of a trustee in bankruptcy.

In the operation of the warehouse at 663 South Anderson Street, appellee omitted no step required or even suggested in the *McCaffey* case. The record not only shows no omissions, but it also affirmatively proves strict compliance.

The operations of Lawrence included every element and we summarize them in order.

1. A storage agreement in writing.

2. Leases in writing, duly recorded.

3. A bonded agent employed and paid by Lawrence.

4. Signs conspicuously posted giving notice to the world not only that Lawrence was the lessee

of the premises, but also in possession of all commodities stored therein.

5. Lawrence had locks on all doors, with its bonded agent holding the only keys, save only the master keys held by the company itself.

6. The exclusion of all, Williams, laborers, salesmen included, from the premises, except when the agent opened the premises to store or release merchandise.

7. Outstanding warehouse receipts by virtue of which the appellee was entitled to the commodity described to satisfy the loan for which the receipts were pledged.

8. Identification of all goods with the warehouse receipt representing them and adequate tags or stack cards attached to the commodities.

9. Delivery of goods by Lawrence only to the person lawfully entitled to possession, either as holder of a receipt, or the depositor, where no receipt was issued.

A bailment is a delivery of property to be held by the bailee upon agreed terms and conditions. It does not require a warehouse receipt. It does require a change of possession.

When appellee and the bankrupt entered into the storage agreement and lease, and appellee took possession of the leased space, appointed its agent and locked the space, the change of possession was complete and it so continued. The holder of the receipts became and continued solely entitled to the commodi-

ties represented by those receipts. That constituted effective "warehousing on the premises of the owner * * * done in obedience to legal requirements".

We submit that the record fully sustains the decision of the District Court.

POINT II.

THE STORING OF COMMODITIES AND PLEDGING OF THE WAREHOUSE RECEIPTS WAS NOT IN VIOLATION OF SECTION 3440 OF THE CIVIL CODE.

THE UNIFORM WAREHOUSE RECEIPTS ACT SPECIFICALLY REPEALED ANY PRIOR INCONSISTENT ACTS.

Under the common law any person, whether merchant, manufacturer, farmer or otherwise, could sell and deliver his stock in trade, his manufactured product, his produce, or other personal property without restriction.

In 1903 the California legislature, following similar legislation in other states, passed the act commonly known as the Bulk Sales Law.

The act, found in Section 3440 of the California Civil Code, is as follows:

> "Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent,

and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any person on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer; * * *"

"Provided, also, that the sale, transfer, or assignment of a stock in trade, in bulk, or a substantial part thereof otherwise than in the ordinary course of trade and in the regular and usual practice and method of business of the vendor, transferor, assignor, and the sale, transfer, assignment or mortgage of the fixtures or store equipment of a baker, cafe or restaurant owner, garage owner, machinist, or retail or wholesale merchant, will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, transferor, assignor or mortgagor, unless at least seven days before the consummation of such sale, transfer, assignment or mortgage, the vendor, transferor, assignor or mortgagor or the intended vendee, transferee, assignee or mortgagee, shall record in the office of the county recorder in the county or counties in which the said stock in trade, fixtures or equipment are situated a notice of said intended sale, transfer, assignment or mortgage, stating the name and address of the intended vendor, transferor, assignor or mortgagor, and the name and address of the intended vendee, transferee, assignee or mortgagee, and a general statement of the character of merchandise or property intended to be sold, assigned, transferred or mortgaged, and the date when and the place where the purchase price or consideration, if any there be, is to be paid."

It is at once apparent that the act is divided into two distinct parts, the first requiring every transfer of personal property to be accompanied by an immediate delivery and change of possession.

That provision is not in conflict with the law of pledges, and, as we have pointed out, there was an actual change of possession of the steel in question from the bankrupt to appellee. Without such change of possession the warehouseman would have violated the provisions of the Uniform Warehouse Receipts Act requiring it to take and hold possession of the merchandise for delivery to the receipt holder.

The second portion of the section makes "the sale, transfer or assignment" of all or a substantial part of a stock in trade or "the sale, transfer, assignment or mortgage of the fixtures and store equipment" presumptively fraudulent and void unless notice be given. The mortgage provision is limited to fixtures and equipment.

If the provisions of that act are susceptible to the construction placed upon it by the trustee, then the merchant not only could not make any sale of all or a substantial part of his stock in trade but he could not use all or a substantial part thereof for the purposes of credit. Without credit the advancement of the commercial world could not have occurred. Without credit, the business of today could not be carried on.

Credit is based upon security. Our great lending institutions, those banking corporations which are entrusted with the funds of hundreds upon hundreds

of individuals, as a result of which the collective funds are made available for commerce, must, of course, be secured in their loans so that the depositors may be repaid upon demand and the investment of the stockholders not impaired.

To avoid the destruction of that vast system of credit, the California legislature was most careful in the language of the act, penal in character, to definitely provide just what transactions were conclusively presumed to be fraudulent. When the act is analyzed, it is clear that it was "designed to prevent the defrauding of creditors by the secret sale in bulk of substantially all of a merchant's stock of goods". (27 Corpus Juris 873.)

The act prohibits a sale, transfer or assignment. In construing those words the ordinary meaning must be applied unless the statutes provide some other definition.

Sale, in its ordinary sense, is the passing of title from one to another for a consideration.

> "Transfer is an act of the parties or of law, by which *the title* to property is conveyed from one living person to another." *Cal. Civil Code,* Sec. 1039.

Thus, we see that both sale and transfer involve the passing of title.

Assignment is defined as "a transfer or making over by a debtor of all his property and effects to one or more assignees in trust for the benefit of his creditors". (2 Story, *Eq. Jur.* 1036.)

Thus, all three terms, i.e., sale, transfer and assignment mean a passing of title.

In *Hannah & Hogg v. Richter Brewing Co.,* 149 Mich. 220, 112 N. W. 713 (1907), the Court say of the Michigan Bulk Sales Law which uses the same three words:

> "The terms, 'sale, transfer or assignment' * * * taken in their usual and ordinary signification, mean the disposition of the entire title of the seller." (112 N. W. Page 714.)

It is not contended that the transactions of the bankrupt with the appellee bank did have the effect of passing the title to the merchandise represented by the warehouse receipts. The notes held by the appellee bank are conclusive that the warehouse receipts were pledged as collateral security.

In *Dale v. Pattison,* 234 U. S. 399, 58 L. Ed. 1370, 34 Sup. Ct. 785 (1914), a case dealing with receipts issued from a distillery warehouse, the Court says:

> "It seems to us, however, that we should not fail to consider the well-recognized distinction between a chattel mortgage and a pledge. A mortgage of chattels imports a present conveyance of the legal title, subject to defeasance upon performance of an express condition subsequent, contained either in the same or in a separate instrument. It may or may not be accompanied by a delivery of possession. On the other hand, where title to the property is not presently transferred, but possession only is given, with power to sell upon default in the performance of a condition, the transaction is a pledge, and not a mortgage." (58 L. Ed., page 1374.)

The Legislature making the law for the State of California, in accordance with which the trustee contends this case must be decided, has firmly adopted the distinction between a conveyance of title and a pledge in the definition of a pledge found in Section 2986 of the Civil Code as follows:

> "Pledge is a deposit of personal property by way of security for the performance of another act."

The Legislature has also placed its construction upon certain transactions and made them pledges by Sections 2987 and 2924, Civil Code. In the former it is provided:

> "Every contract by which the possession of personal property is transferred as security only, is to be deemed a pledge."

In the other:

> "Every transfer of an interest in property other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property, it is accompanied by actual change of possession, it is to be deemed a pledge."

It is thus apparent that what the legislature intended to prohibit was a transfer of title, and not an ordinary transaction by which a merchant is able to borrow money to pursue his business and as security to deposit his merchandise. If the latter had been intended, the word pledge would have been included in the Act with the other three words.

These sections of the Civil Code were all enacted before the adoption of the Bulk Sales Act and unless clearly inconsistent with that act are not in any respect repealed. Far from being inconsistent, they provide a solid foundation, in addition to the Uniform Warehouse Receipts Act, upon which a pledge can and must be sustained.

The interpretation of the Bulk Sales Act which we apply, is further borne out by its own terms. The mortgage of fixtures and equipment is prohibited unless notice is recorded. In other words, a lien cannot be placed upon the fixtures and equipment, in addition to the prohibition against the conveyance of title thereto.

The Civil Code, Sec. 2955, did, at the time of the adopting of the Bulk Sales Law, prohibit the execution of a chattel mortgage on "the stock in trade of a merchant". That furnishes ample reason for not including the mortgage prohibition in relation to the stock in trade. But it conclusively shows that the provisions of the Act were carefully considered and it follows that a pledge as collateral, a deposit of personal property as the statute calls it, was not intended to be included in the prohibitions of the Bulk Sales Law.

Let us repeat in other language.

The laws of California authorize and define a pledge.

The laws of California authorize chattel mortgages.

The laws of California prohibit a chattel mortgage on a stock in trade of a merchant under all circumstances.

The laws of California prohibit a chattel mortgage on fixtures and equipment of a merchant, not under all circumstances but only unless certain provisions are complied with, i. e., the recording of a notice (Bulk Sales Law).

There is no statutory prohibition, express or implied against a pledge. It, therefore, necessarily follows that the sanctity and efficacy of a pledge under the common law still remain in full force in California.

The Supreme Court of California has never, so far as we are advised, construed the Bulk Sales Act in connection with a pledge.

This Court, in *In Re Convisser,* 6 F. (2d) 177 (9th C. C. A., 1925) has said:

> "The manifest purpose of these provisions (Sections 2955 and 3440) was to protect the stock in trade against liens and transfers of every kind for the benefit of general creditors. But, notwithstanding these express statutory prohibitions, the petitioner earnestly insists that a merchant may still pledge the whole, or a substantial part of his stock in trade, because a pledge is not a sale, transfer, or assignment, within the meaning of the law. With this contention we are unable to agree." (Page 178.)

The Court then proceeded to sustain the conclusion by reference to Sec. 1039 (supra) defining transfer as an act by which title is conveyed, and Sec. 2924 (supra) classifying and not defining, as said by the Court, every transfer as security as a mortgage, "except when in the case of personal property it is ac-

companied by actual change of possession, in which case it is to be deemed a pledge", and continued:

> "A pledge is therefore a transfer of personal property accompanied by an actual change of possession, and Section 3440 makes no distinction between transfers accompanied by a change of possession and transfers which are not." (Page 178.)

The Court, we submit, overlooked Section 2986 which so explicitly defines a pledge as "a deposit of personal property by way of security for the performance of another act" and for that reason, misconstrued the statute by considering that title is conveyed whether the transaction be a transfer or a pledge, a construction which is not in accordance with the provisions of these sections.

We urge, therefore, that this statute, penal in nature, cannot be extended by the Court to embrace transactions not covered by its provisions, and that the language thereof is not capable of a construction bringing within its provisions any transaction which does not include a transfer of title and that a pledge is not a transfer of title and, therefore, not prohibited.

To otherwise construe the statute would at once deprive the merchant of a much needed method of financing a legitimate business by cutting off his power to obtain financial assistance through secured loans. The reason for the prohibition against a chattel mortgage, that is the continued possession by the mortgagor of the mortgaged goods, as a result of which persons dealing with the mortgagor are led to believe that the stock in trade represents a security for them, is not

present in the case of a pledge for the reason that the possession is not in the pledgor and no one dealing with him can be deceived into believing that the pledged commodities are a security for transactions occurring subsequent to the pledge.

We submit, therefore, that the pledging of personal property as security for a loan is neither governed nor prohibited by the Bulk Sales Law.

Our contention is supported by the action of the legislature in 1939 in the enactment of Section 3440.5 quoted by the trustee at page 23 of his brief, by which it is provided that Section 3440 shall not apply to goods represented by a warehouse receipt issued by a warehouseman as defined in the Warehouse Receipts Act. The trustee argues that such an enactment leads to the conclusion that prior to the amendment, the original act did apply to such goods.

The section obviously was designed to remove any possible doubt as to the meaning of Section 3440 and to confirm the intent expressed in Section 60 of the Warehouse Receipts Act to repeal inconsistent acts.

Assuming for the purpose of argument, but without admitting the correctness of the assumption, that the second portion of Section 3440 does render void the pledge of personal property unless the required notice is given, we urge that the Warehouse Receipts Act, enacted in 1909, some six years after the Bulk Sales Law, by Section 60 reading,

> "All acts or parts of acts inconsistent with this act are hereby repealed."

has the effect of repealing the second portion of Section 3440.

Nowhere in the Warehouse Receipts Act is there any reference to any notice to be given before warehousing commodities or before negotiating or transferring warehouse receipts.

On the contrary it is provided in Section 25:

> "If goods are delivered to a warehouseman by the owner * * * and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman, or its negotiation enjoined."

Section 42:

> "A person to whom a receipt has been transferred but not negotiated, acquires thereby, as against the transferor, the title of the goods, subject to the terms of any agreement with the transferor."

Thus, we find in these two sections a positive prohibition against the attachment of the goods by a creditor, and an absolute right in the owner to convey his title by a transfer of the receipt, or to pledge that title by agreement with the transferee.

Those provisions are directly contrary to the second portion of Section 3440 even if we read into that portion a pledge transaction.

The Trustee bases his argument on the sentence in the *McCaffey* case (supra) reading,

> "Whether warehousing is called 'field warehousing' or by any other name, it cannot be effectively conducted in this state without compliance with the law as declared in section 3440 of the Civil Code." (p. 435.)

An analysis of that case discloses that the only question was as to the change of possession, that is, the first portion of Section 3440, so that it clearly follows that that was the only portion of the statute dealt with. Had the second portion making a sale, transfer or assignment void without notice been under consideration, there would have been no case to submit to the jury as the record fails to disclose any notice. The decision, therefore, would have been absolute against the receipt holder. And it is worthy of note that Section 60 to which we have called attention, was not even considered in that opinion.

But we are not left to conjecture as to the meaning of Section 60.

We have already discussed in Point I the fact that the purpose of uniform acts is uniformity in all states adopting such legislation and that such uniform acts are all embracing in the subject matter.

In *Jewett v. City Transfer & Storage Co.,* supra, decided three years after the *McCaffey* case, Judges Houser, Conroy and York decided that Section 60 of the Warehouse Receipts Act unequivocally repealed all statutes of California which were inconsistent with that act. In that case the storage company sold stored property for failure of the depositor to pay storage

charges. It failed to give notice required by Section 33 of the Warehouse Receipts Act but sought to justify its conduct under the provisions of Section 3052 of the California Civil Code which grants the right to any person entitled to a lien under Section 3051 to sell on ten days notice. The plaintiff brought an action for conversion. In affirming the judgment for the plaintiffs the Court says:

> "Although in the law the repeal of a statute by implication is not favored, when on comparison of the later law with the earlier statute it becomes apparent that the later law is a revision of the entire subject matter embodied in the respective legislative acts, and that it is designed as a substitute for the earlier statute, the later law is deemed to supersede or repeal the earlier one. (23 Cal. Jur. 694), Smith v. Mathews, 155 Cal. 752, 758 (103 Pac. 199).
>
> "In the case of Mack v. Jastro, 126 Cal. 130, 132 (58 Pac. 372, 373), it is said: '* * * While it is true that repeals by implication are not favored, whenever it becomes apparent that a later statute is revisory of the entire matter of an earlier statute, and is designed as a substitute for it, the later statute will prevail, and the earlier statute will be held to have been superseded, even though there be found no inconsistencies or repugnancies between the two. * * *'
>
> "And see the case of Stoddard v. Crocker, 100 Me. 450 (62 Atl. 241), in which was involved a situation relative to goods stored in a warehouse nearly identical with that in the instant case.
>
> "Considering the provisions of the statute known as the Warehouse Receipts Act, it is apparent that its purpose was to revise the entire

> subject matter relating to the general business of conducting a public warehouse. As hereinbefore indicated, if by any legal reason it may be held that any of the provisions of sections 3051 and 3052 of the Civil Code apply to the subject of liens of warehousemen, those provisions, as to such liens, must be deemed repealed by the later legislative act." (pp. 561-2.)

Here we have a square holding that the Warehouse Receipts Act was intended to revise the entire subject matter of warehousing and that it repeals any earlier conflicting acts.

In Point I we refer to the opinion in *In Re Boswell,* supra, in which a comparable controversy was considered.

In that case the issue arose on the contention of a trustee in bankruptcy that a trust receipt transaction must fail on the ground that the Uniform Trust Receipts Act, adopted by the California Legislature in 1935, was unconstitutional.

District Judge McCormick, in holding the Act constitutional, and sustaining the transaction, said:

> "The Legislature of the state of California at its 1935 session, in line with the interstate policy of unifying as far as possible the commercial laws of the country, enacted the 'Uniform Trust Receipts Act'. * * * The evolution of this important scheme of mercantile law to meet present needs of celerity in credit transactions is shown by the annual handbooks of the commissioners for the years 1925 to 1933, both inclusive. * * *" (p. 749.)

> "So that today these mercantile mediums, because of the beneficial features in quick credit

transactions and their frequent judicial concern, have become thoroughly established and identified in business and law. When the term 'Trust Receipt' is used in commerce, the credit and financial agencies of present-day activities associate it with a security instrumentality that resembles a pledge, a chattel mortgage, or a conditional sale contract, but which is exactly none of these mediums of trade and credit. It is a transaction germane to these instrumentalities because it is like them, closely allied and related to them. Some chief differences that readily enter the mind when the term is used include the absence of actual or immediate delivery or change of possession, the removal of notice, recordation or verification requirements, and retention of title in the vendor.

"The respondent trustee in bankruptcy eloquently animadverts that nowhere in the title to the questioned 'Trust Receipts Law' is there any intimation that the Legislature intended to 'tinker with the salutary provisions regarding chattel mortgages, their recordation, or sales, or assignment of merchandise in bulk * * * or conferring on merchants the right to mortgage their entire stock in trade secretly and without notice whatsoever, unless wholesalers maintain a Bureau at Sacramento to keep a daily check on the office of the Secretary of State?'

"But we think that mentioning the general and commercially understood subject of 'Trust Receipts' in the title connotes and suggests fields of state legislation concerning the requirements of valid chattel mortgages as against third parties and creditors, delivery and possession necessities under laws relating to personal property, and the title expressly states that the statute is aimed at

> 'Trust receipts and pledges of personal property unaccompanied by possession in the pledgee'. This terminology, in the light of historical efforts of financial and mercantile agencies in different states to remove conflicts and complications in the commercial law of the country, is a reasonably intelligent reference to changes that are found in the text of the 'Uniform Trust Receipts Law'. * * *
>
> "The language of the United States Supreme Court in considering the 'Uniform Warehouse Receipts Act' in Commercial Nat. Bank v. Canal-Louisiana Bank & Trust Co., 239 U. S. 520, 528, is considered a chart for our course in this similar effort of the state of California to join in the march of states removing some of the objectionable conflicts in the laws that regulate credit and business throughout the country." (pages 751-2.)

In unanimously affirming that decision, this Court, in an opinion written by Circuit Judge Denman, said, among other things:

> "We agree with the admirably reasoned opinion of the District Judge * * *." (page 241.)

Thus, we find that the Uniform Trust Receipts Act does away not only with the second portion of the Bulk Sales Law, but also with the first provision requiring a change of possession. And, in addition, it is a square holding that the later adopted Uniform Act must and does supersede the earlier cumbersome Bulk Sales Law and is a step in uniformity.

So, also, does the Uniform Warehouse Receipts Act, by the same reasoning of uniformity and necessity in the commercial credit world supersede and re-

peal the Bulk Sales Law in transactions had in accordance with the Uniform Act.

We shall not burden this Court with a detailed discussion of the other cases cited in Point I of appellant's brief but content ourselves with the observation that in each case the two statutes considered were not in conflict.

We conclude, therefore, that the Bulk Sales Law, neither before nor after amendment, governed pledges through the medium of warehouse receipts, and that, even assuming that it had application for the six years before the enactment of the Warehouse Receipts Act, it was repealed thereby.

CONCLUSION.

The Supreme Court of Tennessee, in *Bank of Rome* v. *Haselton,* 83 Tenn. 216 (1885), in sustaining the pledge of warehouse receipts representing bar iron, pig iron, nails and spikes commingled with similar articles not represented by warehouse receipts said:

> "To hold otherwise would be to make him (the warehouseman) personally liable to the receipt holders for the amount of their advances, and at the same time take out of his possession the very property on account of which the liability was assumed, and turn it over to other creditors. This would be little short of judicial robbery, and would operate to suppress the business of warehousing in our state. *The validity of a pledge, and the right that accompanies possession, would be entirely disregarded in such a decision.*" (page 245; italics ours.)

We submit that a recognized system of warehousing, operating throughout the country, making over $200,000,000.00 of inventory available as collateral for working capital, by which possession of that inventory is turned over to the warehouse company, and held in space to which it is legally and exclusively entitled and upon which no one may enter without notice of that possession of the warehouseman, and then only in the presence of the bonded agent of the warehouse company, is not "a sham and pretended possession", but on the contrary is a necessary function in the commercial world; that the system is legitimate; and is in accordance with the laws of California.

We submit that the record in this case conclusively shows the meticulous adherence by this appellee with every condition required in lawful and proper warehousing and that, therefore, the order of the District Court should be affirmed.

Dated, San Francisco, California,
May 22, 1940.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Index to Appendix

Appendix

SECTION 3440 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA AS IN EFFECT AT THE TIME OF THE TRANSACTIONS WHICH ARE THE SUBJECT OF THIS LITIGATION.

Transfers Presumed Fraudulent: Transfers of Wines: Bulk Sale: Public Auction: Transfers Under Orders of Court. Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any person on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer;

Transfers of wines: Provided, however, that the provisions of this section shall not apply to the transfers of wines in the wineries or wine cellars of the makers or owners thereof, or other persons having possession, care and control of the same, and the pipes, casks, and tanks in which the said wines are contained, which transfers shall be made in writing, and certified and verified in the same form as provided for chattel mortgages, and which shall be re-

corded in the book of miscellaneous records in the office of the county recorder of the county in which the same are situated;

Bulk sales: Provided, also, that the sale, transfer, or assignment of a stock in trade, in bulk, or a substantial part thereof otherwise than in the ordinary course of trade and in the regular and usual practice and method of business of the vendor, transferor, or assignor, and the sale, transfer, assignment or mortgage of the fixtures or store equipment of a baker, cafe or restaurant owner, garage owner, machinist, or retail or wholesale merchant, will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, transferor, assignor or mortgagor, unless at least seven days before the consummation of such sale, transfer, assignment or mortgage, the vendor, transferor, assignor or mortgagor, or the intended vendee, transferee, assignee or mortgagee, shall record in the office of the county recorder in the county or counties in which the said stock in trade, fixtures or equipment are situated a notice of said intended sale, transfer, assignment or mortgage, stating the name and address of the intended vendor, transferor, assignor or mortgagor, and the name and address of the intended vendee, transferee, assignee or mortgagee, and a general statement of the character of the merchandise or property intended to be sold, assigned, transferred or mortgaged, and the date when and the place where the purchase price or consideration if any there be, is to be paid;

Public auctions: Provided, nevertheless, that if such intended sale is to be at public auction the notice

above required to be recorded shall state that fact, the time, terms, and place of said sale, the names and addresses of the vendor and auctioneer, and a general statement of the character of the merchandise or property intended to be sold; but such sale shall in no event occur within seven days of the date of recordation of said notice; and any auctioneer selling said stock in trade or fixtures and store equipment of a baker, cafe or restaurant owner, garage owner, machinist, or retail or wholesale merchant shall be personally liable for all damages incurred by any creditor of said merchant in the event said notice is not recorded as aforesaid;

Transfers under order of court. Provided, further, that the provisions of this section shall not apply or extend to any sale, transfer assignment or mortgage of the fixtures or store equipment of a baker, cafe or restaurant owner, garage owner, machinist, or retail or wholesale merchant made under the direction or order of a court of competent jurisdiction or by any executor, administrator, guardian, receiver, or other officer or person acting in the regular and proper discharge of official duty, or in the discharge of any trust imposed upon him by law, nor to any transfer or assignment, statutory or otherwise, nor to any mortgage or chattel mortgage made for the benefit of creditors generally, nor to any sale, transfer, assignment or mortgage of any property exempt from execution. (Enacted 1872; Amended by Stats. 1895, p. 47; Stats. 1903, p. 111; Stats. 1917, p. 255; Stats. 1923, p. 167; Stats. 1925, p. 725.

SECTION 3440.5 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA. IN EFFECT ON 91ST DAY AFTER JUNE 20, 1939.

EXCEPTING GOODS IN WAREHOUSE: Section 3440 of this code shall not apply to goods in a warehouse where a warehouse receipt has been issued therefor by a warehouseman as defined in the Warehouse Receipts Act, and a copy of such receipt is kept at the principal place of business of the warehouseman within the city or county in which is located the warehouse in which said goods are stored. Such copy shall be open to inspection upon written order of the owner or lawful holder of such receipt. (In effect on 91st day after June 20, 1939. Stats. 1939, Chap. 1036.)

UNIFORM WAREHOUSE RECEIPTS ACT.

(California Stats. 1909, Ch. 290, Deering's General Laws Act 9059.)

§8. RIGHTS OF HOLDER OF RECEIPT. A warehouseman, in the absence of some lawful excuse provided by this act, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with—

(a) An offer to satisfy the warehouseman's lien,

(b) An offer to surrender the receipt if negotiable, with such indorsements as would be necessary for the negotiation of the receipt, and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman.

In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal.

UNIFORM WAREHOUSE RECEIPTS ACT.

(California Stats. 1909, Ch. 290, Deering's General Laws Act 9059.)

§10. Liability for Delivery to Persons not Entitled. Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section and though he delivered the goods as authorized by said subdivision he shall be so liable, if prior to such delivery he had either

(a) Been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery, or

(b) Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods.

UNIFORM WAREHOUSE RECEIPTS ACT.

(California Stats. 1909, Ch. 290, Deering's General Laws Act 9059.)

§20. Liability for Nonexistence or Misdescription of Goods. A warehouseman shall be liable to the holder of a receipt, issued by him or on his behalf by

an agent or employee the scope of whose actual or apparent authority includes the issuing of warehouse receipts, for damages caused by the nonexistence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them, or upon the packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that the packages containing the goods are said to contain goods of a certain kind, or by words of like purpose, such statements, if true shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor. (Amended Stats. 1923, p. 676.)

UNIFORM WAREHOUSE RECEIPTS ACT.

(California Stats. 1909, Ch. 290, Deering's General Laws Act 9059.)

§21. Injury to Goods. A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care.